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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1037

MOOG INC., *Petitioner,*

v.

PEGASUS LABORATORIES, INC., *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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CITATIONS

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OPINIONS BELOW

The two opinions of the District Court (Appendix of Petition, pp. 1a-25a) are respectively reported at 376 F.Supp. 439 and 376 F.Supp. 445. The opinion of the Court of Appeals for the Sixth Circuit (Appendix of Petition, pp. 26a-36a) is reported at 521 F.2d 501.

JURISDICTION

The Petition adequately sets forth the jurisdictional requisites.

QUESTION PRESENTED

Whether the courts below erred in holding that 35 U.S.C. § 135(c) rendered permanently unenforceable a patent eventuating from an interference where an interference settlement agreement was not filed in the time required by the Statute.

STATUTE INVOLVED

Section 135(c), Title 35, United States Code is reprinted in its entirety in the Petition at p. 3. Its pertinent provisions are as follows:

> "(c) Any agreement or understanding between parties to an interference, including any collateral agreements referred to therein, made in connection with or in contemplation of the termination of the interference, shall be in writing and a true copy thereof filed in the Patent Office before the termination of the interference as between the said parties to the agreement or understanding. . . . Failure to file the copy of such agreement or understanding shall render permanently unenforceable such agreement or understanding and any patent of such parties involved in the interference or any patent subsequently issued on any application of such parties so involved. . . ." *

STATEMENT OF THE CASE

This suit was brought in the United States District Court for the Eastern District of Michigan, Southern Division, by petitioner Moog, Inc. [hereafter Moog] against respondent Pegasus Laboratories, Inc. [hereafter Pegasus] charging infringement of United States Letters Patent 3,228,423 [hereafter the patent in suit].

* Two limited exceptions to the requirement for reducing such agreements to writing and filing them prior to termination of the interference are provided for in the Statute. These are not involved here and Moog has failed to contend otherwise either below or in its Petition for Writ of Certiorari.

A separate trial was had on the issue of whether the patent in suit was unenforceable under 35 U.S.C. § 135(c) [hereafter the Statute]. The unenforceability question centered around certain agreements made between Moog and Bell Aerospace Corp. [hereafter Bell] in the course of Patent Office interference proceedings involving the application for the patent in suit.

The Moog patent application disclosed a "dry motor" servovalve characterized by the presence of a flexure member of tubular shape. One interference related to broad "flexure member" claims. The other related to narrow "flexure tube" claims. The relation between the two types of claims was that of blocking patent claims; since every "flexure tube" is a "flexure member", one desiring to use a "flexure tube" would require rights under both the broad and the narrow claims.

As of August 21, 1964, Moog and Bell entered into agreements setting a procedure for determining priority of invention on the basis of a private exchange of priority proofs. As consideration for this private determination of priority the agreements gave each of Moog and Bell full rights to use and license others to use any of the involved patent rights. These agreements were filed in the Patent Office on August 27, 1964, less than a week later.

On February 10, 1965 Moog's representative and Bell's representative exchanged documents by mail. On February 17, 1965 the representatives orally agreed to split the interferences—the broad "flexure member"

claims going to Bell and the narrow "flexure tube" claims going to Moog—, but concessions of priority were not to be filed until understanding was reached on a proposal by Moog for revising the earlier agreements so that neither Moog nor Bell would thereafter have the power to license third parties under patents granted to the other of them on the interfering patent applications.

Bell orally accepted the proposal for modifying the earlier agreements on February 25, 1965. On March 4 and 5, 1965 documents were filed in the Patent Office conceding priority to Bell in the broad "flexure member" interference and to Moog in the narrow "flexure tube" interference.

Execution of documents embodying the new Moog-Bell understanding was completed on March 16, 1965. On May 11, 1965, the Patent Office terminated the interferences; but it was not until almost a year later that the copies of the new Moog-Bell agreements were submitted to the Patent Office. At that time the Patent Office noted that no action could be taken with respect to the documents because they had not been submitted within the time period provided by the Statute for their filing.

The District Court held the patent in suit unenforceable in light of the foregoing facts and the Court of Appeals determined that those facts not only supported but *indeed compelled* the holding of unenforceability. (Appendix of Petition at 31a)

ARGUMENT

Moog's petition for certiorari is not properly founded on any of the grounds most frequently justifying the grant of such a writ by this Court. There is no genuine

constitutional law question. There is no conflict in the law as between different circuits. There is no public policy question of general interest and importance.

Although this litigation in fact involves nothing more than a straightforward application of a statute setting out one prerequisite to the grant of enforceable patent rights in certain situations, Moog bases its plea for the requested writ of certiorari on suggestions that the intervention of this Court is necessary to resolve heretofore unsettled but important questions of federal law. In an attempt to support its plea, Moog:

(a) cites questionable data regarding numbers of cases involving interference settlement agreements as indicative of an aspect of importance associated with the issue here;

(b) argues that the lower court decisions here leave the law regarding the Statute in a state of confusion, thus requiring guidance from this Court; and

(c) claims that the question involved in this case is one of first impression. Moog appears to contend additionally that there was a change in practice by the Commissioner of Patents in administering the Statute, and that this also should be clarified by this Court.

As will be demonstrated below, Moog could not be further from the mark in suggesting that the numerical data on interferences indicate that any questions of widespread import could arise from the present case. Nor is Moog correct in its submissions that this case involves a question of first impression and that the lower courts' disposition of this case leaves the law in a confused state. Finally, the alleged change in practice by the Commissioner of Patents simply does not exist for practical purposes, and, in any event, this is not a

matter on which Moog has standing to complain or on which the Court could properly act in this case.

These factors, coupled with the manifest correctness of the decision below clearly render the present case inappropriate for review by this Court on certiorari.

I.

The Numerical Approach Suggested by Moog Fails to Support Moog's Assertion of an "Important Question"

From old (years 1957-61) data of untested authenticity, Moog speculates that 600 agreements are required to be filed in the Patent Office each year by the Statute. Even this speculated figure is not impressive as an indication of "importance" in any relevant sense. Moreover, the speculated figure has no relation whatever to cases involving the narrow issues in litigation here.

Not even Moog suggests that there has been a statistically significant number of instances where patent applicants have failed to file their interference agreements as required by the Statute. Moog admits that a grand total of three decided cases, other than the present one, on the issue of non-compliance with the Statute have been reported since its enactment fourteen years ago. Hence, it is clearly inappropriate to suggest that statistics on interference settlements in general have anything to do with the number, if any, of legitimate questions which have arisen as to applicability of the Statute.

II.

The Lower Court Decisions Left No Room for Doubt as to the Applicability of the Statute to This Case and Other Similar Cases

The sum and substance of the Statute involved here is that patent rights involved in an interference will be permanently unenforceable unless any interference agreements between the parties are reduced to writing and filed in the Patent Office before termination of the interference. There is simply no controversy that the new Moog-Bell agreements of 1965 were not reduced to writing and so filed prior to termination of the Moog-Bell interferences.

Faced with a hopeless cause, Moog argued that it would be appropriate to create judicially an exception to the plain words of the Statute in some unusual circumstances. At Moog's request, the District Court addressed these clever arguments, and in its First Memorandum Opinion (Appendix of Petition at 1a-13a) refused to assume, for purposes of summary judgment, that patent unenforceability will necessarily result in every possible instance where an interference agreement was not timely filed.

Moog now seizes upon this as an opportunity to argue that:

> "the lower court decisions in the instant case leave the intent and meaning of the statute in a state of confusion, such as by focusing on the content of such agreements rather than on the fact of their filing, and by failing to apply established principles of statutory construction." (Petition at 7)

Moog conveniently overlooks that is was Moog's own earlier arguments which caused the District Court to

look at the content of the agreements as a possible basis on which an exception to the Statute might be founded. Thus the focus about which Moog now complains was optically engendered by its own lenses.

Moreover, no confusion can result from the District Court's willingness in its First Memorandum Opinion to entertain the idea that some day a case might come along where unenforceability for failure to comply with the Statute would be inappropriate. In its later opinion, the District Court went on to find that this clearly was not such a case. In the Court's own words:

> "Because the parties' priority determinations could not have terminated the interferences unless they were submitted to the Patent Office as formal concessions, and because the agreement to remove the sublicense rights was made a precondition to the filing of those concessions, that agreement was made 'in connection with or in contemplation of the termination of the interference' under even the most stringent and demanding interpretation of the necessary connexity. How much less would suffice need not now be determined." (Appendix of Petition at 22a)

The Court of Appeals confirmed this sentiment with the following observation:

> "Since the facts in this record appear to us to support (indeed to compel!) the District Judge's findings of fact and conclusions as arrived at in his second opinion, we find no need to deal in this case with the questions considered in his first opinion. (Appendix of Petition at 31a)

In summary, having requested that the applicability of the Statute be in some respects geared to content of the agreements, Moog should not be heard to

complain of alleged confusion over the need, in certain cases, to examine content, particularly where, as here, the lower courts were both thoroughly convinced that this is not such a case and handed down opinions that were clear on that point. No better case for the acceptance of the concurrent findings of the District Court and Circuit Court of Appeals could be envisioned. *Cf., Goodyear Co.* v. *Ray-O Vac Co.,* 321 U.S. 275, 278 (1944).

III.

The Question of Law in This Case Is Well Settled

Moog's third "reason for granting the writ" embodies a suggestion that this case is one of first impression. However, the patent unenforceability here is no different from that envisioned in the earlier case of *Esso Research and Eng'r Co.* v. *Brenner, Comm'r,* — F.2d —, 165 U.S.P.Q. 486 (D.C. Cir. 1970). In *Esso,* a patentee sued to compel official receipt by the Patent Office of an interference agreement first tendered for filing long after the interference had been terminated; the Patent Office took the position that it had no authority to accept the agreement after the statutory period; and the court upheld the Patent Office position in full recognition that this action had the consequence of confirming the permanent unenforceability of the involved patent under 35 U.S.C. § 135(c):

> "Although the sanction is concededly harsh, especially in a case like this where only human failure—and not deliberate disregard—was apparently involved, only Congress can conceivably relieve appellant from the consequences which surely attach under the statute as written." *Id.* at 487.

Throughout the litigation below and in its present Petition, Moog has continually sought to create some aura of novelty on the basis of the fact that in *Esso* there was an outright refusal to accept the agreement while here the Patent Office merely advised that, "No action can be taken . . . , since it was filed subsequent to the termination of the interference. 35 U.S.C. § 135(c)." (Appendix of Petition at 8a). Of course, it is merely a play on the word "file" to say that the agreement in *Esso* was never filed whereas the one here was filed late. It is outrageously unrealistic to conclude that the late tender made in *Esso* is not the same as the late submission made here, or that the refusal of the Patent Office in *Esso* to accept the late tender is not the same as the Patent Office refusal here to take action on the late submission of the Moog-Bell agreements. Yet, unless one of those conclusions is reached, *Esso* cannot be distinguished, and this case is *Esso* all over again.

A document cannot be "filed" in compliance with the Statute unless it is tendered at a time when the Patent Office can lawfully receive it in compliance with the Statute. The Commissioner of Patents need not, in order to prevent evasion of the Statute, station someone at the door to physically bar the reception of documents that the Commissioner is not authorized in law to receive officially, and he need not keep the Patent Office employees from physically placing such documents in file folders.

IV.

There Was No Change in Administrative Practice Which Injured Moog or Which Needs Review by This Court

Moog's suggestion that a change in administrative practice has occurred is not supported by the record.

In order to establish that there was a change in practice on the part of the Patent Office as between *Esso* and the present case, it would be necessary to prove there was no difference in what was done by the private parties in the two cases in seeking to accomplish "filing" at a time when the Statute did not permit a legal filing. This has not been done. From all that can be learned from the opinion in *Esso,* the document there may have been proffered by way of a request to the Commissioner to file it. In the present case however, neither Moog nor Bell asked for leave to submit the document after the period provided for in the Statute. Instead, the document was just mailed in to the Patent Office.

Although the record fails to reveal the facts as to the physical handling of the documents in *Esso,* the legal effect of what the Patent Office did in both cases was exactly the same. In both, the Patent Office refused to validate a noncompliance with the Statute.

Under these circumstances, for this Court to review the objected to practice of the Commissioner of Patents (if that could be at all appropriate in the Commissioner's absence as a party) would be a meaningless, unproductive act.

V.

The Decision Below Is Clearly Correct

The only submission by Moog of alleged *error* on the part of the courts below is the failure of those

courts to consider "the legal consequence of *mere* tardiness" in filing. Petition at 10 (emphasis added). Only brief consideration of the opinions below is required to demonstrate that there was no such error, for it is only Moog who characterizes as "mere" tardiness the withholding of the agreements from the Patent Office until after the interferences had been terminated and after the patents had been issued to the parties.

The background of this case unquestionably involved a withholding of an avowedly anticompetitive agreement from the Patent Office at a time when the parties sought to have the Patent Office terminate the interferences and award blocking patents to the parties. According to the Court of Appeals:

> "this record shows that Moog and Bell did exactly what § 135 was designed to prevent. Their agreement to abrogate their previously filed agreement for cross-licensing was illegally withheld from the Patent Office. It represented the very sort of antitrust violation which § 135 was designed to restrain.
>
> * * * * * * * *
>
> "As we see the matter (and as the District Judge saw it), the withholding of the supplemental agreement cannot be considered an inadvertence. [citation and footnote omitted]. The District Court was right in finding a causal relationship between the withholding and the termination of the interference. He was also right in holding the patent in suit was 'permanently unenforceable under § 135(c).'" (Appendix of Petition at 33a-36a)

Against that background, it can hardly be said that the lower courts erred in applying the Statute as written.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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